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THE MIRACULOUS YEAR 2010 IN UNITED STATES GAY RIGHTS LAW: ANOMALY OR TIPPING POINT?

Arthur S. Leonard*

Introduction

During 2010, a series of decisions by United States District Court judges[1] appeared to mark a significant breakthrough in the ongoing struggle by sexual minorities in the United States to achieve legal equality through the removal of objectionable laws and policies. Almost as if a dam had broken, there was a sudden rush of developments on three highly contested fronts: (1) the statutory ban on military service by openly gay individuals, (2) the exclusion from federal recognition for lawfully contracted same-sex marriages, and (3) a popularly enacted California state constitutional amendment taking away same-sex marriage rights that had previously been granted by a state supreme court decision. In each of these cases, the district courts declared the contested policy to be unconstitutional and ordered injunctive relief, placing in doubt the willingness of courts to continue crediting traditional arguments that had been successfully invoked by the government when defending these and similar policies in past cases.

Trial judges' decision are not final if the government seeks to appeal, and all of these trial court decisions were appealed, so the string of trial court victories during 2010 might be ephemeral anomalies. But the judges' written opinions, lengthy and detailed and carefully reasoned so as to pose a significant challenge to the appellants, seemed very firmly based on extensive factual findings and likely to survive review, suggesting that a tipping point, a moment of decisive change on sexual minority issues, may have been reached in the U.S. federal courts. Additionally, some of the opinions seem to have had a persuasive effect on the other branches of the federal government, as the Congress and the Executive Branch moved later in the year to provisionally repeal the military policy[2] and the Executive signalled on February 23, 2011,

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[1] *Gill v. Office of Personnel Management*, 699 F.Supp.2d 374 (D. Mass., July 8, 2011); *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services*, 698 F.Supp.2d 234 (D.Mass., July 8, 2010) (both holding unconstitutional Section 3 of the federal Defense of Marriage Act of 1996); *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D.Cal., Aug. 3, 2010) (holding unconstitutional a California state constitutional amendment enacted by Proposition 8 of 2008 which provided that only different-sex marriages would be valid or recognized in California); *Log Cabin Republicans v. United States of America*, 716 F.Supp.2d 884 (C.D.Cal., Sept. 9, 2010); *Witt v. U.S. Department of the Air Force*, 2010 Westlaw 3732189 (W.D.Wash., Sept. 24, 2010) (holding unconstitutional the federal policy on military service by gay people (LCR) and ordering reinstatement of a lesbian who had been discharged under the policy (Witt)).

[2] *Don't Ask Don't Tell Repeal Act* of 2010, enacted December 22, 2010.

that it no longer believed that the federal non-recognition policy was constitutional, based on a doctrinal analysis that had potentially far-reaching consequences for future gay rights claims.[3] As a practical consequence of this Executive announcement, the chances that two of these rulings would be reversed on appeal appeared significantly diminished.[4]
In this comment, I argue that these decisions may work a fundamental change in the analysis of LGBT constitutional claims that portends significant progress towards achieving legal equality for sexual minorities in the United States.

I. The Underlying Doctrinal Issues.

Each of the contested policies was challenged by invoking constitutional doctrines of due process of law and/or equal protection of the law found in the 5th and 14th Amendments of the United States Constitution. The 5th Amendment, adopted as part of the Bill of Rights in 1791, forbids the *federal government* from depriving anyone of life, liberty or property "without due process of law." The 14th Amendment, adopted after the American Civil War (1861-65), similarly forbids the *states* from depriving "any person of life, liberty, or property, without due process of law," and further provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court has ruled that the concept of equal protection of the laws is so integral to the guarantee of due process that the 5th Amendment should also be construed to incorporate an equal protection requirement as a restraint on the action of the federal government. Thus, at the heart of constitutional protection for individual rights are the requirements of due process and equal protection.

Further, the Supreme Court has ruled, controversially to some, that the guarantee of due process is not merely procedural but also incorporates a substantive component such that laws abridging rights of life, liberty or property must always at least meet the test that a rational lawmaker could have believed, when enacting the measure, that it would actually advance a legitimate, non-discriminatory governmental interest. The Supreme Court has gone further to hold that when a government policy abridges a right that the Supreme Court has identified as fundamental, the trial court should presume that the policy violates the due process guarantee unless the government meets the burden to show that the policy is actually necessary to achieve a 'compelling' interest of the state.

The Supreme Court has adopted a similar method of analyzing equal protection claims. Recognizing that most government policies may be seen to have unequal effects or to bestow unequal benefits, the Court has ruled that

[3] U.S. Department of Justice, February 23, 2011 [Letter from Attorney General Eric Holder, Jr., to Speaker of the House of Representatives John Boehner, explaining the Administration's position, available on the website of the U.S. Department of Justice].
[4] The Justice Department informed the 1st Circuit, pursuant to the Department's announcement, that it would not substantively defend the non-recognition policy, embodied in Section 3 of the Defense of Marriage Act, in the pending appeals.

ordinarily a policy that was enacted or adopted through procedurally regular means will be presumed constitutional unless a challenger can show that rational lawmakers could not have believed that the policy was calculated to achieve a legitimate, non-discriminatory governmental purpose. As in the case of due process challenges, a policy that creates inequality concerning a 'fundamental right' will be presumed unconstitutional, throwing the burden on the government to show that the policy is necessary to achieve a compelling governmental interest and that it imposes no more inequality than is required to achieve that interest, and mere hypotheses about what legislators could have believed at the time of enactment will not suffice to save such a law.

Furthermore, the Court has ruled that the presumption of unconstitutionality should also apply when the government has adopted a policy that discriminates on some basis that should be treated as 'suspect' because either history or the nature of the classification at issue would naturally give rise to a reasonable suspicion that illegitimate motives – prejudice, bigotry, stereotypes – had infected the lawmaking process. Over the past half century, the Supreme Court has developed a complicated jurisprudence of equal protection under which various personal characteristics have been identified as grounds upon which to impose the presumption of unconstitutionality and to place a burden of justification on the government. In light of the history leading to the enactment of the 14th Amendment, it was inevitable that race and colour would be the paradigmatic suspect classifications. When the government uses such a classification in a law or decision, the Court will subject the government's justifications to strict scrutiny, the same analytical method that it uses to review policies that abridge fundamental rights.

During the 1970s, the Court came to the view that government policies drawing distinctions based on sex, while not 'suspect' in the same way as racial classifications, should nonetheless be subjected to at least heightened scrutiny. In this manner the government's burden would be to show that the policy was calculated to substantially advance an important governmental interest. When the struggle for gay rights in the United States began to resort to the courts in earnest during the second half of the twentieth century, major effort was been directed towards persuading the courts that laws particularly abridging the liberties of sexual minorities and subjecting them to unequal treatment should either be subjected to strict or heightened scrutiny or, if evaluated under the ordinary standard of rational basis, should be stricken as founded on prejudice rather than legitimate policy concerns. The particular significance of the district court decisions from 2010, discussed below, is that they may signal that this effort of more than half a century is finally bearing substantial fruit.

II. The Historic Unsuccessful Resort to Constitutional Litigation by Sexual Minorities

The Supreme Court's first major decision in which sexual minorities sought to challenge a government policy using this substantive individual rights

framework[5] was *Bowers v. Hardwick*,[6] a case brought by a resident of Georgia who had been arrested in his home when a police officer discovered him engaging in oral sex with another man. The state of Georgia's penal code made it a felony for anybody to engage in oral or anal sex under any circumstances. The plaintiff, Michael Hardwick, contended that application of this law to his private, consensual sexual conduct with another adult violated his due process and equal protection rights. A federal trial court ruled against him, finding no basis in prior appellate decisions for his claim, but the U.S. Court of Appeals for the 11th Circuit reversed, finding that past decisions of the Supreme Court in cases involving sexual privacy could support the argument that the statute violated the Due Process Clause of the 14th Amendment. The Supreme Court granted the state of Georgia's petition for review, and issued its decision reversing the court of appeals in 1986.

The Supreme Court framed the question before it as whether the Constitution "confers a fundamental right upon homosexuals"[7] (the right to engage in consensual sodomy) and rejected the constitutional claim, asserting that the conduct in this case bore no resemblance to the conduct that had been protected in prior sexual privacy cases involving contraception and abortion. The Court observed that sodomy had been subject to criminal penalties in all the states by common law or statute from colonial times until the 1960s, when some states began to adopt the recommendation of the drafters of the Model Penal Code to remove penalties for private, consensual adult sexuality activity, and thus the claimed right could not be characterized historically as a fundamental right. At the time of the decision, more than half of the states still maintained criminal penalties for consensual sodomy (oral or anal sex). The Court characterized the plaintiff's contention that this conduct could be constitutionally protected as "facetious,"[8] asserting that the presumed moral disapproval of homosexuality by the legislature provided a rational basis for the law. The Court was sharply divided, voting 5-4, with strongly worded dissenting opinions claiming that the Court had failed to apply its sexual privacy precedents correctly, and that the history of penalization could not justify the imposition of the criminal law on harmless private adult intimacies.

As a result of the *Bowers* decision, federal district courts and courts of appeals over the ensuing decade, bound by Supreme Court precedent, were extremely sceptical about both due process and equal protection claims brought by gay litigants. If conduct that in some sense defined 'the class' could be outlawed by the states, how could the court find that the government was not entitled to treat members of the class as putative criminals, who could be excluded from

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[5] In an earlier case, *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967), the Court rejected a procedural due process challenge to a provision of the immigration law used by the government to justify denying entry to or deporting homosexuals as "psychopathic personalities." The Court rejected the due process claim that the term was too vague to meet constitutional requirements. The case did not consider a substantive due process claim.

[6] *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[7] *Ibid.* , at 190.

[8] *Ibid.*, at 194.

the benefits of government programs and subject to discriminatory treatment?[9] Lawsuits brought during that period posing federal constitutional challenges to the version of the regulatory ban on military service then in effect as well as the exclusion from the right to marry of same-sex couples, were uniformly unsuccessful. Inevitably, in cases where the courts concluded that neither a fundamental right nor a suspect classification was implicated, the challenged policies were deemed presumptively constitutional, and the government could justify them— as Georgia had justified its sodomy law—by reference to the presumed moral disapproval of homosexuality by the majority of society and a desire to signal such disapproval through the imposition of inferior status or treatment.

During this period, however, gay litigants responded to *Bowers* by diversifying their litigation and political strategies, challenging sodomy laws in state courts under state constitutions with some success, initiating claims that exclusion from marriage violated state constitutional guarantees, and lobbying legislatures for sodomy law repeal and the enactment of protection against discrimination based on sexual orientation and, beginning in the 1990s, gender identity. These efforts produced some successes and some failures. Sometimes the successes provoked political backlash from opponents of gay rights, and one such backlash led to the first Supreme Court case to counter the baleful effect of *Bowers*, *Romer v. Evans*.[10]

Lobbying efforts in the state of Colorado had resulted in persuading several city councils to enact local ordinances banning sexual orientation discrimination in employment, housing and public accommodations, and also led to executive adoption of similar policies, including an executive order by the governor banning discrimination by the executive branch of the state government. Opponents of gay rights successfully petitioned to place on the state-wide ballot a constitutional amendment that would prohibit the state or any of its subdivisions from adopting policies treating 'homosexuals' as a protected class. Voters approve the measure in November 1992. Gay rights advocates immediately filed a state court lawsuit challenging its constitutionality under the 14th Amendment's Equal Protection Clause, and won temporary injunctive relief while the lawsuit was pending. The Colorado Supreme Court deemed the measure unconstitutional on the ground that it would abridge the political rights to equal participation by gay people, by disempowering the legislature and local governments from enacting the kinds of policies described in the amendment.[11] The state government appealed to the United States Supreme Court, which affirmed on a different rationale in a decision announced in 1996.

According to the Supreme Court, the challenged Colorado *Amendment* 2 was unconstitutional because it created a classification without any rational policy justification. The Court described the amendment as a 'sweeping' measure that

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[9] See, e.g., *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563 (9th Cir. 1980).

[10] *Romer v. Evans*, 517 U.S. 620 (1996).

[11] *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993).

went far beyond what might have been necessary to achieve any legitimate governmental interest that might be hypothesized to justify it. As such, the Court said that it 'defied' conventional equal protection analysis, and so the Court did not engage in such analysis to reach its decision. Instead, concluding that the only plausible explanation for the enactment of this measure was moral disapproval and dislike for homosexuals, the Court found that it violated the Equal Protection Clause because it created a discriminatory classification for its own sake. The Court asserted that no state could thus treat a group of individuals as 'strangers to the law' without some non-discriminatory justification.

In dissent, Justice Antonin Scalia argued that the Court's decision—which never mentioned *Bowers v. Hardwick*—had either silently overruled that case or at least reached a result that was inconsistent with it. Justice Scalia repeated the rationale that lower federal courts had articulated for rejecting equal protection claims after *Bowers*, and argued that 'seemingly tolerant' Coloradans could have rationally concluded, without any animus, that their government should not provide any 'special protection' to a group whose members engage in conduct that is not constitutionally protected. Scalia accused the majority of improperly taking sides in a 'culture war' rather than applying accepted modes of legal analysis to reach its result.[12] Responding in the Court's opinion, Justice Anthony Kennedy argued that the case was not about 'special rights,' but rather the ordinary entitlement to equal protection of the laws that people generally took for granted.

Neither opinion explicitly surfaced a major conceptual distinction between the two cases: that *Bowers* explicitly dealt with conduct while *Romer* explicitly dealt with status. This distinction had been elided by those lower courts – whose opinions Scalia cited in dissent – that had relied upon *Bowers* to reject gay equal protection claims. Where a majority of the *Bowers* court was willing to count majoritarian moral disapproval for a particular conduct as a justification for subjecting the conduct to criminal penalties, the *Romer* majority was not willing to allow moral disapproval of a conduct associated with a particular group of people to deprive that group of equal treatment under the law. Possibly some of the justices in the *Romer* majority experienced the doctrinal tension described by Scalia, but felt that the case before them did not require them to confront *Bowers* directly, precisely because of this distinction. The author of the *Romer* opinion, however, had signalled his concerns about potential constitutional protection for homosexual conduct as a lower court judge,[13] and went on years later to author the Court's opinion overruling *Bowers*.

While the Court's decision (by a 6-3 vote) was a welcome victory for sexual minorities, it did not appear to have altered the doctrinal playing field significantly. The Court did not identify sexual orientation as a suspect

[12] 517 U.S., at 636-653.
[13] *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980).

classification, did not discuss presumptions or burdens of proof and did not mention or expressly apply heightened scrutiny, having concluded without using any of those analytical terms that the measure failed to meet the least demanding test of rationality. Many lower federal courts, ruling in the aftermath of *Romer*, asserted that the Court had determined that sexual orientation claims were to be evaluated using the deferential rationality test,[14] and continued to reject equal protection claims in most cases by hypothesizing legitimate justifications for state action. In order to win an equal protection claim in the aftermath of *Romer*, a gay litigant would have to show that the challenged government policy or action was virtually inexplicable *absent animus*, although some litigants won when the government proffered no justification for discrimination because it claimed that no discrimination had occurred. When a jury or judge found that discrimination had occurred, the gay plaintiff would essentially win by default if the court could not imagine a legitimate justification for the challenged action.[15]

Advocates for sexual minorities continued to challenge sodomy laws in the courts after *Bowers*, but focused their efforts on state courts, raising state constitutional claims, until the end of the 1990s, when they began to test the waters in the wake of *Romer* by asserting alternative federal constitutional grounds. Marriage cases, on the other hand, were brought solely on state constitutional grounds during this period, and were not successful prior to the Supreme Court's next major gay rights decision, *Lawrence v. Texas*,[16] in 2003.

Lawrence arose out of a sodomy prosecution. A police officer arrested John Geddes Lawrence and Tyron Garner in Lawrence's bedroom, claiming to have observed them engaging in unlawful sexual conduct with each other. A Justice of the Peace convicted them under the state's *Homosexual Conduct Act*, which prohibited same sex anal or oral sex as a misdemeanour. They appealed, preserving at every step their claim that the application of the law to them was unconstitutional under the state and federal constitutions, but the state courts rejected their arguments. The Supreme Court granted review, agreeing to consider whether the *Homosexual Conduct Act* violated either the Due Process or Equal Protection Clauses of the 14th Amendment, and specifically whether *Bowers v. Hardwick* should be overruled.

The Supreme Court concluded that the statute violated the appellants' constitutional rights. A majority of the Court (five members) joined an opinion

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[14] For a detailed discussion of the phenomenon of the lingering impact of Bowers after Romer, see A. Leonard, 'Exorcizing the Ghosts of *Bowers v. Hardwick*: Uprooting Invalid Precedents', *Chicago-Kent Law Review* 2009-84, p. 519.

[15] For example, in *Quinn v. Nassau County Police Department*, 53 F.Supp.2d 347 (E.D.N.Y. 1999), the defendants, denying that they had subjected the plaintiff to improper harassment and discrimination on account of his sexual orientation, offered no justification for their actions, and the court, having found the plaintiff's factual allegations to be true and being unable to imagine a legitimate policy justification for subjecting a gay police officer to harassment, ruled for the plaintiff.

[16] *Lawrence v. Texas*, 539 U.S. 558 (2003).

by Justice Kennedy that premised the ruling on the Due Process Clause, finding that private, consensual homosexual conduct involving adults came within the liberty protected by that provision, while one member of the Court (Justice Sandra Day O'Connor, who had been part of the voting majority in *Bowers*) preferred to base the ruling on the Equal Protection Clause, arguing that the *Homosexual Conduct Act* drew a line between gay and non-gay people for no legitimate reason, while the three dissenters would have reaffirmed *Bowers* as controlling. After declaring that *Bowers* had been wrongly decided and should be overruled, the operative sentence of the majority's opinion stated: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[17]

Justice Kennedy wrote the opinions for the Court in both *Romer* and *Lawrence*. As he had done in *Romer*, where he avoided using the terminology of suspect classification and heightened scrutiny, in *Lawrence* he refrained from explicitly discussing whether the case involved a fundamental right or merited the application of heightened scrutiny, instead asserting that *Bowers* was wrongly decided, as inconsistent with the Court's prior rulings on issues such as birth control and abortion (where the Court had used fundamental rights and strict scrutiny language), and that no legitimate justification for impinging on the liberty of individuals engaging in private consensual homosexual conduct had been shown. Kennedy conceded that a 'tenable argument' could be made that the state law violated equal protection, but asserted that it was necessary to overrule *Bowers* and premise the case on due process, to ensure that nobody could argue that the decision left it open to the states that still criminalized such conduct to preserve their laws by applying the sodomy ban equally to "different-sex participants" as well as "same-sex participants."[18] Kennedy also observed that the concepts of "equality of treatment" and "due process right to respect for conduct protected by the substantive guarantee of liberty" were "linked in important respects," and that a due process ruling would also further the interest in equal protection.[19]

Lawrence, like *Romer*, was an important victory, striking down a law that overtly discriminated against gay people and, implicitly, striking down all remaining laws criminalizing consensual sodomy involving adults acting in private. Sodomy laws sustained by majoritarian moral disapproval of homosexuality had long undergirded the entire legal regime of anti-gay government policies. But the ultimate doctrinal impact of *Lawrence* was no more obvious than that of *Romer* when the opinions were first announced. Because the Court refrained from using such terms as 'suspect classification' or 'fundamental right' or 'heightened scrutiny' in conducting its analysis, it remained open to lower courts to conclude that nothing had changed, doctrinally, apart from the precise holdings of the two cases: that laws overtly discriminating against gay people cannot be hypothetically justified by anti-gay

[17] *Ibid.*, at 578.
[18] *Ibid.*, at 574-5.
[19] *Idem.*

animus, and that criminal prosecution may not be applied to private, consensual non-commercial adult homosexual conduct.

Perhaps the best illustration of the doctrinal uncertainty left in the wake of *Romer* and *Lawrence* was the decision by the United States Court of Appeals for the 11th Circuit in *Lofton v. Secretary, Department of Children and Family Services*,[20] a case involving a due process and equal protection challenge to a Florida statute forbidding 'homosexuals' from adopting children. The statute was adopted in 1977 in the wake of a furiously waged campaign over a voter initiative to repeal a local ordinance forbidding sexual orientation discrimination in Dade County, Florida. Proponents of repeal premised their campaign on the necessity to protect children from being exposed to openly gay public school teachers, and argued generally that exposure to homosexuals was harmful to the normal development of children. As a majority of the county's voters repealed the local ordinance, the state legislature was inspired to codify the electoral campaign's message by enacting a statutory ban on homosexuals adopting children.

Prior attempts to invalidate the Florida statute in state court litigation were unsuccessful, and a new challenge was mounted in federal district court after the *Romer* decision. But the 11th Circuit majority, ruling after *Lawrence*, found that neither *Romer* nor *Lawrence* required subjecting the law to heightened scrutiny, applied the deferential rationality test, and hypothesized that Florida legislators could have believed that children were better off in traditional families headed by different-sex couples and thus were motivated by the best interest of children rather than by animus against homosexuals in passing the statute.

Such justifications would not likely have carried the day in a heightened scrutiny case, in light of the positions taken by professional organizations concerned with child welfare. (The *Child Welfare League of America* filed an amicus brief in support of the plaintiff, summarizing the views from professional journals.) Had the state been required to prove that being raised by gay parents was harmful to children, they would not have been able to meet that burden, since by the 21st century the professional literature on child development no longer provided support for the government's case. The Supreme Court's subsequent refusal to review the 11th Circuit's decision, although not a ruling on the merits, might be construed by lower courts to confirm the conclusion that a state policy that overtly excluded or disadvantaged gay people was presumptively constitutional and could be adequately justified by reference to unproven conventional wisdom and traditional stereotypes. The 11th Circuit's analytical approach was followed by some other federal courts in the years immediately following *Lawrence*, but changes were brewing as new challenges to policies adversely affecting gay people were brought in state and federal courts.

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[20] *Lofton v. Secretary*, 358 F.3d 804 (11th Cir.), petition for rehearing *en banc* denied, 377 F.3d 1275 (2004), petition for *certiorari* denied, 543 U.S. 1081 (2005).

III. The Miraculous Year of 2010

During 2010, federal district courts issued a series of rulings using the due process or equal protection doctrines to invalidate laws that adversely affected gay people, decisively rejecting the kind of rationalizations that had previously been accepted by numerous courts. The accumulation of significant rulings in cases that had been pending before the courts for several years suggested that a new consensus might be emerging among federal judges rejecting the traditional arguments that had been made to support such policies. As important as the substantive results in these cases—the declaration that particular laws were unconstitutional— were the doctrinal results that might be transferable to other on-going disputes over gay rights.

III.1 The Military Cases

One of the longest-running gay rights legal battles concerns military service. Military penal law condemned all 'sodomy' from early times. Prior to World War II the armed forces adopted their first categorical policies supporting the exclusion of homosexuals from enlistment, and their discharge if discovered in the service, based on the assertion that homosexuality was incompatible with military service. During the post-war period, regulations allowed a degree of discretion to commanders to retain homosexuals in the ranks, but the strong inclination was towards dismissal unless pressing staffing needs outweighed other concerns. As early as the 1970s, gay people were litigating over discriminatory military policies with mixed results.[21] The Defense Department reacted to some litigation setbacks by revising the policy to be non-discretionary, but President William J. Clinton's election in 1992 after his pledge to end the ban led to the first legislative consideration of the topic. All prior policies had been based on regulations generated internally by the military, whose leadership was firmly opposed to any change. The legislative process resulted in a compromise policy enacted in 1993, under which gay people would be allowed to serve only if they kept their sexuality secret and it was not discovered by military officials – the so-called *Don't Ask Don't Tell policy* (DADT). Attempts to challenge DADT after *Romer* foundered, most notably in a major test case brought jointly by leading LGBT rights organizations, *Able v. United States*.[22] The courts insisted that the extensive record of Congressional hearings in 1993 leading to the DADT policy made it impossible to reject the policy under rationality review, as the hearing record included sworn testimony from numerous top military officials that allowing openly gay people to serve would compromise the ability of the military to fulfill its national defence functions effectively. This purported justification, combined with the deference to military judgment that has marked judicial consideration of challenges to military policies, was enough to doom the challenge.

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[21] See, e.g., *Matlovitch v. Secretary of the Air Force*, 591 F.2d 852 (D.C.Cir. 1978); *Berg v. Claytor*, 591 F.2d 849 (D.C.Cir. 1978).

[22] 155 F.3d 628 (2d. Cir. 1998).

After *Lawrence*, two courts of appeals concluded for the first time that pending challenges to the military policy based on due process arguments would merit heightened scrutiny rather than rationality review. First the 9th Circuit (in *Witt v Department of the Air Force*)[23] and then the 1st Circuit (in *Cook v. Gates*)[24] concluded that *Lawrence* was only explicable as a heightened scrutiny case, suggesting that any government policy that burdened the liberty interest protected by the 5th Amendment Due Process clause could be sustained only if the government demonstrated an important policy interest that was substantially furthered by the challenged policy. Both courts, of course, recognized that national security and defence were important policy concerns, indeed compelling interests, but under heightened scrutiny the government would have to show that the ban substantially advanced those policies. At the same time, both courts held that prior precedents in their circuits mandated using the deferential rationality test to evaluate the plaintiffs' alternative equal protection claims, which must consequently be dismissed.

These preliminary determinations led to different results in the two pending cases. The 9th Circuit held that in a case involving the discharge of an individual service member under the policy (an 'as applied' challenge to the policy), the government's burden would be to show that discharging this particular individual would substantially advance an important interest, and remanded the case for trial. The 1st Circuit case, however, was a test case that did not contest specific discharges but rather mounted a facial challenge to the statute by an organization representing LGB service members. The court held that in light of the required deference to military judgment and the substantial legislative history, the policy would survive heightened scrutiny and no trial was needed.

The case that would bring all the strands together and result in one of the two miraculous 2010 decisions involving military policy was a test case brought by an organization called *Log Cabin Republicans* (LCR), which filed suit in the federal district court in Riverside, California (within the 9th Circuit), shortly after *Lawrence*, seeking a declaration of facial invalidity of the policy. Lengthy pre-trial skirmishing over issues of standing and discovery delayed the trial until 2010. Prior to trial before District Judge Virginia Phillips, the court ruled that under *Witt* the plaintiffs' equal protection claim must be dismissed, but that its due process (and free speech 1st Amendment) claims should go to trial. Significantly, the court also held that in light of the 9th Circuit's *Witt* ruling, it would apply heightened scrutiny as its standard of judicial review, placing the burden on the government to show that the policy actually substantially advanced the national defence and security interests that the government would normally raise to justify it.

Judge Phillips ruled on September 9, 2010, that the government failed to meet its burden. The government had rested its case heavily on the 1993 legislative

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[23] 527 F.3d 806, en banc review denied, 548 F.3d 1264 (9th Cir. 2008).
[24] 528 F.3d 42 (1st Cir. 2008).

record, but the world had changed since 1993, with many of America's major military allies having abandoned their own exclusionary military policies. American troops were serving together in the Middle East with troops from allied countries that allowed gay people to serve openly without any obvious disruption. U.S. military staffing needs skyrocketed with the wars in Iraq and Afghanistan but the government did not wish to adopt conscription and, in order to fulfil enlistment needs, had relaxed educational standards and abandoned routine exclusion of applicants with criminal records. Contrary to the 'justifications' for gay exclusion cited by Congress in 1993, gay people were not quickly dismissed when discovered shortly before or during overseas assignment to conflict areas, but instead processed for discharge on grounds of homosexuality on a more selective basis. The district judge found that these factors fatally undermined the government's purported justification for maintaining the ban, and mandated a declaration of unconstitutionality and injunctive relief. The court issued an amended version of its opinion on October 10. The government sought a stay pending appeal, which the trial court denied but the 9th Circuit Court of Appeals granted.[25]

Meanwhile, events were proceeding in parallel in the other pending challenge to the military policy within the 9th Circuit, the *Witt* case. On September 24, 2010, District Judge Ronald B. Leighton of the U.S. District Court for the Western District of Washington found that the government had failed to show how the discharge of Air Force Reserve Major Margaret Witt, a highly-decorated military nurse, had advanced any of the polices articulated to justify the policy. Major Witt had been discharged when it was discovered that she had engaged in a discreet same-sex relationship with a civilian while off-duty and off-base. Her commanders had testified that there was no reason other than the policy to discharge her, and the court received evidence that her discharge had adversely affected morale in the operation where she had worked. The court ordered the reinstatement of Major Witt, should she apply and be otherwise qualified. The government quickly appealed, obtaining a stay of the court's order pending the outcome.[26]

The government's losses in these two cases became part of the argument used by the Obama Administration to persuade Congress to end the policy. Early in 2010 the Secretary of Defense, Robert Gates, had appointed a special working group to study how the policy could be ended without harming military effectiveness, in line with President Barack Obama's campaign pledge in 2008 to seek an end to the policy. The two court decisions were announced while the working group was doing its research and preparing its report towards the deadline of December 1. A measure authorizing repeal of the policy was attached to a military spending bill pending in the House of Representatives and was actually approved as part of the spending bill early in this process, but attempts to move it forward in the Senate on the same basis encountered

[25] *Log Cabin Republicans v. U.S.*, 2010 WL 4136210 (9th Cir. 2010). The Supreme Court rejected a motion to vacate the stay, *Log Cabin Republicans v. U.S.*, 131 S.Ct. 589 (2010).
[26] *Witt v. U.S. Department of the Air Force*, 739 F.Supp.2d 1308 (W.D.Wash. 2010).

substantial opposition from the Republican leadership, not least because of other features of the bill that the Republicans found objectionable, most specifically a measure to extend U.S. citizenship to undocumented aliens who served in the Armed Forces. Although Republicans held a minority of seats in the Senate, under that chamber's operative rules a minority of at least forty-one members can block consideration of pending legislation, and the Republicans controlled enough seats to prevent a vote on the military bill.

In the November 2010 elections, the Republicans won control of the House and increased the size of their minority in the Senate, making it likely that repeal of the policy would not be attainable after the new Congress convened in January 2011. At the end of November, the Defense Department working group submitted its report, concluding that repeal of the policy could be accomplished in a deliberative way, involving the adoption of various new policies and educational programs within the military. Armed with the report and the threat posed by the recent court decisions, Secretary Gates argued to Congress that letting the policy be ended by the courts was the less desirable course since it would require immediate changes rather than the gradual, orderly implementation outlined in the working group's report. After another attempt to pass the military spending bill in the Senate was unsuccessful, a group of proponents for repeal in both houses worked out a strategy to create a stand-alone 'Don't Ask, Don't Tell Repeal Act,' and put it up quickly for a vote. Shorn of its attachment to other controversial measures, the measure narrowly passed the Senate (with the support of enough Republican senators to overcome the prior rules barrier) and was quickly approved by the House and signed into law by President Obama on December 22, 2010.[27] Under its terms, the policy will end sixty days after the President, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff (in effect, the chief uniformed military commander) jointly certify in writing to Congress that all necessary policy changes have been undertaken and that the change in policy will not adversely affect the operation of the armed forces. At this writing, it is expected that the 'don't ask, don't tell' policy will be ended before the end of 2011, as President Obama pledged in January 2011 during his annual State of the Union address to Congress, when the Defense Department was undertaking the necessary implementation plans.

Because the prior policy remained in effect, the appeals of the district court rulings continued before the 9th Circuit, putting the government in the now ironic position of having to argue to justify a policy that had just been repealed at the urging of the Obama Administration. The government urged the 9th Circuit to delay briefing, argument and decision of the cases, in anticipation that they would become moot when the policy ended, but the court was unwilling to play that game, as the winning plaintiffs pointed out that the repeal statute set no firm deadline for ending the policy and the Defence Department had refused to commit in advance to a date certain when it would be willing to make the necessary certification to Congress.

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[27] Pub.L. 111-321 (Dec. 22, 2010).

But the particulars of the ongoing litigation are less important to the theme of this article than are the doctrinal developments of the two trial court opinions and their potential impact in future cases involving government policies that disadvantage gay people, for this is the first litigation in which such government policies have been declared unconstitutional using heightened scrutiny in a Due Process challenge. Because of the 9th Circuit's ruling remanding the *Witt* case for trial and requiring the government to justify its actions under the heightened scrutiny standard, as well as the subsequent rulings in both *Witt* and *Log Cabin Republicans* finding that the government failed to meet its burden, important new ground had been broken. Even if the cases are eventually deemed moot because the challenged policy has been abandoned by the government, the published court opinions stand and are likely to be very influential in future Due Process cases, especially when one considers that they were rendered in the context of the military where the rule of deference to the judgments of government officials (military leaders) is normally very strong and virtually outcome-determinative.

III.2 Federal Recognition of Same-Sex Marriages

Congress approved the Defense of Marriage Act (DOMA)[28] in 1996, and it was signed into law by President Bill Clinton shortly before the national election. DOMA was a response to marriage litigation begun in Hawaii several years before. A group of same-sex couples had filed suit in state court, contending that the denial of marriage licenses to them violated the state constitution's due process and equal protection guarantees. Although a trial court had dismissed their case, the Hawaii Supreme Court reversed in *Baehr v. Lewin*, a 1993 decision holding that refusing to allow same-sex couples to marry was a form of sex discrimination and that sex was a suspect classification under the Hawaii constitution.[29] This meant that at the subsequent trial, the marriage policy would be presumed unconstitutional unless the state could show that it was necessary to achieve a compelling state interest. Facially discriminatory policies based on suspect classifications rarely survive judicial review, so it seemed likely, in prospect, that the trial scheduled for October 1996 could result in a ruling for the plaintiffs. At the same time, speculation flourished among gay rights activists and in the media that if same-sex marriage became legal in Hawaii, where there was no residency requirement to obtain a marriage license, same-sex couples from all over the United States would descend on Hawaii to get married and then return to their home states asserting that their marriages must be recognized in accord with the Full Faith and Credit Clause (Article IV, Section 1) of the United States Constitution, which provides that

[28] Pub. L. No. 104-199, 110 Stat. 2419 (1996).
[29] *Baehr v. Lewin*, 852 P.2d 44 (Hi. 1993).

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

That such then-startling legal developments (the Hawaii ruling was the first by any appellate court anywhere to suggest that denying the right to marry to same-sex couples might be unconstitutional or unlawful) were occurring during a congressional and presidential election year threatened to make same-sex marriage a major campaign issue. The Republicans, seeking to hold their recently acquired congressional majorities and to reclaim the White House from President Clinton, sought to make it so. Republicans in Congress introduced the Defense of Marriage Act and clearly signalled their intention to make opposition to same-sex marriage a major campaign issue, to the discomfiture of those Democrats who relied upon the gay community as an important part of their electoral base and source of volunteers and campaign donations. Public opinion polling showed little support for same-sex marriage in the electorate, and some Democrats made a pragmatic calculation that it was wise to take this issue off the table. As a result, the *Defense of Marriage Act* quickly won bipartisan sponsorship and the endorsement of President Clinton, effectively taking the same-sex marriage issue out of the election.

In setting forth purposes underlying the legislative determination that only different-sex marriages should be recognized for purposes of federal law, the House Report on the bill that became DOMA makes clear that the legislation was intended to embody opposition to same-sex marriage and to "defend the institution of traditional heterosexual marriage." The other specific goals the Report articulated included to encourage "responsible procreation and child-rearing," to conserve scarce resources by ensuring that married same-sex couples would not be entitled to federal benefits, and to express Congress's moral disapproval of homosexuality "and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."[30]

Shortly after the November election, the Hawaii trial court ruled for the plaintiffs,[31] but the decision was stayed pending appeal, and the Hawaii Supreme Court delayed considering until it had been mooted by the passage of a state constitutional amendment that provided that only the legislature had authority to determine whether same-sex couples could marry.[32]

Meanwhile DOMA went into effect. At the time, it was a statute bereft of a reason for existence, other than its political utility in the 1996 election, for at that time same-sex marriage was unobtainable for United States residents. DOMA had two operative provisions. Section 2 provided that no state would be obligated to extend full faith and credit to same-sex marriages performed in

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[30] H.R. Rep. No. 104-664, reprinted in 1996 U.S.C.C.A.N. 2905.

[31] *Baehr v. Miike*, 1996 WL 694235 (Hi. Cir. Ct., 1st Cir. 1996).

[32] *Baehr v. Miike*, 994 P.2d 566 (Hi. 1999)(table), full text of Summary Disposition Order, which is summarized at 26 BNA Fam. L. Rep. 1075 (December 14, 1999), can be found at http://fl.bna.com/fl/20371.htm (3 May, 2011).

other states, but at that time no same-sex marriages were being performed in any states. Section 3 provided that the federal government would not recognize any of the non-existent same-sex marriages for any purpose of federal law. As no state authorized same-sex marriages at that time, Section 3 had no apparent operative effect. Section 3 stood as a policy statement for courts to invoke against same-sex couples seeking some sort of recognition of their relationships by the federal government, but because nobody could get married, nobody had actual standing to challenge the constitutionality of DOMA during this period of its existence.

The weight of DOMA became real once same-sex marriages became available. Early in the 21st century, various foreign jurisdictions began to extend the right to marry to same-sex couples and, after the Supreme Court decided *Lawrence v. Texas* in 2003, marriage litigation based on state constitutional claims began to achieve some limited success within the United States.[33] In November 2003, the Massachusetts Supreme Judicial Court ruled in *Goodridge v. Department of Public Health*[34] that same-sex couples in that state had a right to marry, ordering that the decision be implemented in a period of six months. Subsequent same-sex marriage rulings yielded mixed results, but within a few years the right to marry had been declared by courts in several other states, and questions of marriage recognition across state lines and by the federal government emerged.[35] Same-sex couples who married in Massachusetts, especially those who were federal employees, immediately began encountering the kinds of problems posed by the failure of the federal government to recognize their marriages, due to disqualification from various federal benefits that are routinely available to spouses of public employees.

Gay and Lesbian Advocates and Defenders (GLAD), a public interest law firm in Boston, filed suit in federal court on behalf of some married same-sex couples and some surviving spouses from same-sex marriages, claiming that the federal government's failure to recognize their marriages for purposes of particular benefits or programs normally available to married federal employees or their surviving spouses violated the obligation of equal protection of the laws under

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[33] Ruling several years prior to Lawrence, the Vermont Supreme Court held in *Baker v. State*, 744 A.2d 864 (Vt. 1999), that denying the rights and benefits of marriage under state law to same-sex couples violated the "Equal Benefits" provision of the state constitution, but a majority of the court did not conclude that this mandated a right to marry. The Vermont legislature responded to the decision by enacting a Civil Union Act, under which same-sex couples could form civil unions that would be treated as a state-law equivalent of marriage. Almost a decade later, the Vermont legislature voted to abandon the distinction between marriages and civil unions and make marriage available to same-sex couples.

[34] 798 N.E.2d 941 (Mass. Sup.Ct. 2003).

[35] As of March 2011, the states of Connecticut (2008), Iowa (2009), Massachusetts (2004), New Hampshire (2010), and Vermont (2009), and the District of Columbia (2010) authorize same-sex marriage. Unsuccessful same-sex marriage litigation during the first decade of the 21st century occurred in New Jersey, New York, Maryland, Washington, and Oregon. The California Supreme Court ruled in favour of same-sex marriage in 2008, and several thousand couples married pursuant to its decision, but the public approved an initiative amendment to the state constitution that end the performance of same-sex marriages later that year, and is currently under federal constitutional attack, as described in part III.3 of this article, below.

the 5th Amendment.[36] The state's attorney general filed a parallel lawsuit, alleging that the federal government's failure to recognize lawfully contracted same-sex marriages of Massachusetts residents violated the federal scheme under which states determine who can marry, and improperly forced the state itself to discriminate against its own married same-sex couples in administering programs that were subject to federal requirements, in violation of the Spending Clause (Article I, Section 8) of the Constitution.[37] This was, in effect, a double barrelled assault on Section 3 of DOMA.

Because prior 1st Circuit precedents specified that equal protection claims by gay litigants did not involve a suspect classification,[38] and because their benefits claims did not involve fundamental rights, the plaintiffs confronted a presumption that Section 3 was constitutional, assuming the burden of showing that there was no rational basis for its enactment, normally a very difficult task. In this case, however, by focusing narrowly on the specific benefits that were being denied, the plaintiffs were able to make the argument that the sweeping disqualification imposed by Section 3 could not be justified in its application to their particular claims. In its rush to enact DOMA in 1996, Congress had not devoted any time to analyze the policy justifications for denying access to legally married same-sex couples to all of the individual benefits and entitlements strewn throughout the United States Code, and a report from the Government Accountability Office enumerating these provisions was not even requested until after the measure was enacted, so only the most general sorts of justifications were stated in the legislative history.

Although in a rational basis case the government has no burden of proof or production, nonetheless the government sought to defend Section 3 by posing hypothetical justifications, as it decided to disavow the reasons for the statute that were recited in the legislative history, some of which the Obama Administration would find politically awkward to argue because they contradicted positions the president had taken in his election campaign and in the party platform. The government argued that Congress could plausibly have desired to preserve a uniform approach under federal law to the definition of marriage while the issue of whether same-sex marriage would be allowed was being debated and answered differently in different state, and that Section 3 could be construed to be taking a neutral position in the heated marriage debate and preserving the federal *status quo ante* as the issue of same-sex marriage played out on a state by state basis. The government defended DOMA as the sort of incremental approach to a newly emerging social issue that Congress may decide to employ. These arguments were easily refuted by the plaintiffs, since refusing to recognize marriage was hardly neutral, and District Judge Joseph L. Tauro decisively rejected each of these justifications as failing

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[36] *Gill v. Office of Personnel Management*, 699 F.Supp.2d 473 (D. Mass. 2010).

[37] *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services*, 698 F.Supp.2d 234 (D. Mass. 2010).

[38] E.g., *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008).

to "ground a rational relationship between the classification employed and a legitimate governmental objective," in his decision issued on July 8, 2010.[39]

Judge Tauro found that the determination of who could marry is allocated to the states in the American federal system, and rejected the contention that the federal government had any legitimate interest in preserving some sort of uniform definition of marriage for purposes of federal benefits. Indeed, the *status quo ante* under federal law from the foundation of the country until the enactment of DOMA accommodated variations in state marriage law by recognizing all lawfully contracted marriages for federal purposes, including during the period when some states allowed mixed-race marriages and others prohibited them. Even with the end of laws against mixed-race marriage in 1967, there remained variations among the states in the age at which individuals could marry and in whether first cousins could marry. DOMA was the first attempt by Congress to dictate a uniform definition of marriage for federal law and, as such did not preserve the *status quo*. Judge Tauro also rejected the argument that preserving the *status quo* could be a legitimate interest, or that DOMA necessarily established federal consistency, since the other variations among state marriage laws remained and only same-sex couples were disadvantaged by the application of Section 3. Judge Tauro also rejected administrative convenience as a justification for unequal treatment, and found that uniformity could not serve as a sufficient rational explanation for a sweeping measure disqualifying married same-sex couples from equal treatment under the more than 1,000 federal laws that use the terms 'marriage' or 'spouse.'[40]

Judge Tauro concluded that under DOMA "it is only sexual orientation that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled," and the court "can conceive of no way in which such a difference might be relevant to the provision of benefits at issue." Tauro observed that by premising benefits on marriage in the various federal benefits laws, Congress had distinguished between married and unmarried people, using marital status as the dividing line. Once states allowed same-sex couples to marry, there had to be some salient distinction between different-sex and same-sex married couples to justify unequal treatment, but dividing the class of married couples created, in Judge Tauro's view, 'a distinction without meaning,' leaving the court to conclude that "it is only irrational prejudice that motivates the challenged classification." Irrational prejudice is not sufficient to sustain a statute that facially discriminates.[41]

On the same date, Judge Tauro ruled in the parallel case brought by the Attorney General of Massachusetts, Martha Coakley, claiming a violation of the

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[39] 699 F.Supp.2d at 390.

[40] The court was referring to a study by the U.S. Government Accountability Office, prepared in response to the original enactment of DOMA in 1996 and update to reflect subsequent federal legislation through 2004, GAO-04-353R Defense of Marriage Act (2004), available at http://www.gao.gov/new.items/d04353r.pdf (3 May 2011)

[41] 699 F.Supp.2d at 396-397.

10th Amendment (which provides that powers not specifically delegated in the constitution to the federal government are reserved to the states and the people, respectively) and the Spending Clause (Article I, Section 8). The court denied the government's motion to dismiss, and granted the plaintiff's motion for summary judgment, finding that through the enactment of Section 3 the federal government had exceeded its power under the federal scheme by improperly trenching on the state's authority (state sovereignty) in the area of domestic relations, and exceeded its power under the Spending Clause by requiring the state to distinguish between same-sex and different-sex married couples in the administration of various programs carried out with federal funds, in violation of the state's own constitutional obligations to its citizens.[42]

The parties agreed that relief pursuant to the court's order granting the plaintiffs' motion for summary judgment should be stayed pending the government's appeal, and the government promptly appealed to the U.S. Court of Appeals for the 1st Circuit, in Boston. But the court's decision prompted GLAD to file a new lawsuit in Connecticut on November 9,[43] on behalf of married same-sex couples from several New England states, and the American Civil Liberties Union filed another lawsuit in New York on the same day,[44] representing a same-sex surviving spouse who suffered the onerous tax consequences of non-recognition of her marriage by the Internal Revenue Service, both cases raising new challenges to Section 3. Judge Tauro was not alone among the federal courts in questioning the government's justifications for Section 3, either, as U.S. District Judge Claudia Wilken subsequently denied the government's motion to dismiss a DOMA suit pending in California, in an opinion generally agreeing with Tauro's analysis.[45]

Connecticut and New York are within the 2nd Circuit, where there is no appellate precedent on the appropriate level of judicial review of sexual orientation discrimination claims. In seeking to dismiss the complaint or to file an answer, the federal government, which had litigated in *Gill* with rational basis as the 1st Circuit standard of review, would have to make an argument in response to the plaintiffs' contentions that DOMA should be subjected to heightened scrutiny. Preparing to respond to the complaints, Justice Department attorneys concluded that the heightened scrutiny standard should apply in these cases and that Section 3 was not defensible under such a standard. Attorney General Eric H. Holder, Jr., concurred with his staff and forwarded the legal analysis to President Barack Obama, who agreed. As a result, the Department of Justice announced on February 23, 2011, that it

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[42] *Commonwealth v. U.S. Department of Health and Human Services*, 698 F.Supp.2d 234 (D. Mass. 2010).

[43] *Pedersen v. Office of Personnel Management*, No. 3:10-cv-1750 (D.Conn., filed November 9, 2010).

[44] *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y., filed November 9, 2010).

[45] *Dragovich v. U.S. Department of the Treasury*, 2011 Westlaw 175502 (N.D.Cal. 2011)(challenging Section 3 in the context of a federal Internal Revenue Code provision relied upon by California officials to denying same-sex couples married in California in 2008 the right to participate in a group insurance program).

would not oppose the argument that heightened scrutiny applied in these two pending cases, and that it would not argue that Section 3 survived heightened scrutiny, although it would continue to enforce Section 3 until Congress repealed it or the appellate courts definitively declared it unconstitutional.

A letter signed by Attorney General Holder was sent that day to the Speaker of the House of Representatives, Representative John Boehner, explaining the Administration's position that it would no longer defend Section 3 in pending litigation, and pointing out that Congress could seek to defend the statute on its own.[46] Holder indicated that the Justice Department would continue to represent the United States in these lawsuits, and would take any steps necessary to facilitate the ability of Congress to defend the statute. Two days later, the Department sent a letter to Speaker Boehner listing the various cases in which challenges to Section 3 were pending in federal court and advising on their procedural posture. Depending how one counts consolidated cases, it appeared that there were at least nine cases, with more sure to be filed as a result of the Administration's announcement of its position. The Justice Department also notified the 1st Circuit that it would not substantively defend Section 3 against the Equal Protection challenge in the pending appeals from Judge Tauro's decisions.

It seems highly likely that Judge Tauro's July 8 rulings contributed to the Justice Department's decision against defending Section 3. Tauro struck the Section using a rational basis analysis, due to prevailing 1st Circuit precedent, but his discussion of the various justifications argued by the Justice Department undoubtedly contributed to the Department's conclusion that if heightened scrutiny applied, Section 3 was sure to fall. The Department's conclusion that heightened scrutiny applied was unexpected, however, since the Administration had been successfully litigating gay equal protection claims concerning the military under the rational basis standard for some time. (In *Witt*, *Log Cabin Republicans*, and *Cook*, the courts had rejected equal protection challenges to DADT out of hand.) The analysis set out in General Holder's letter to Speaker Boehner relied on the conclusion that *Romer v. Evans* did not establish a standard of review for such claims, and that a straightforward application of the analysis the Supreme Court had been using in equal protection cases supported a requirement of heightened scrutiny in sexual orientation cases, finding that as a classification it met all the criteria that the Supreme Court had discussed in dealing with the standard of review in other cases. The House leadership subsequently authorized the Legal Counsel to the House to undertake the defence of Section 3 in pending litigation, and former U.S. Solicitor General Paul Clement, now in private practice, was retained for that purpose.

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[46] Letter from Attorney General to Congress on Litigation Involving the Defense of Marriage Act, Department of Justice, Office of Public Affairs, Wednesday, February 23, 2011, available at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html (3 May 2011).

The Justice Department's announcement and sudden retreat in the pending DOMA challenges sealed Judge Tauro's rulings as the second component of the miraculous 2010 developments in LGBT rights law in the United States.

III.3 The Proposition 8 Litigation in California

On May 15, 2008, the California Supreme Court ruled that a California statute prohibiting same-sex marriage violated the state constitution.[47] Same-sex couples began getting married when the decision became effective a month later, and continued to do so until November 5, 2008, the day after the election, when state officials announced that voters had approved Proposition 8, an initiative proposal to take the contested statutory provision and turn it into a state constitutional provision.

Opponents of Proposition 8 immediately filed an action in the California Supreme Court, claiming that Proposition 8 had not been validly enacted in conformity with state constitutional requirements. That court ruled on May 26, 2009, in *Strauss v. Horton*, that Proposition 8 was validly enacted, but that the couples who had married between June and November remained validly married and that the enactment of Proposition 8 did not affect the status of individuals who were registered as domestic partners in California, a status carrying almost all of the state law rights of marriage.[48]

A few days earlier, anticipating the possibility that the California Supreme Court would reject the procedural challenge to Proposition 8, the *American Foundation for Equal Rights* (AFER), a non-profit organization specifically formed to litigate for the restoration of same-sex marriage in California, had filed suit on May 22 in the United States District Court in San Francisco, contending that the enactment of Proposition 8 violated the 14th Amendment of the United States Constitution.[49] The filing of *Perry v. Schwarzenegger* attracted widespread media attention, at least in part because co-counsel for the plaintiffs were Theodore Olson, the conservative former Solicitor General of the United States during the first term of President George W. Bush, who had represented President Bush in the Supreme Court case that determined the result of the 2000 presidential election, and David Boies, a leading liberal Democratic lawyer who had represented Vice President Albert Gore in that same Supreme Court case.[50] That these ideological opposites would join together to challenge the enactment of Proposition 8 immediately lent extraordinary public interest to the case. The chief judge of the U.S. District Court for the Northern District of California, Vaughn R. Walker, was assigned to hear the case.

Not only was the case unusual in light of the identity of co-counsel for the plaintiffs (nominally two same-sex couples who had unsuccessfully applied for

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[47] *In Re Marriage Cases,* 43 Cal.4th 757, 183 P.3d 384 (2008).
[48] *Strauss v. Horton*, 46 Cal.4th 364, 207 P.3d 48 (2009).
[49] *Perry v. Schwarzenegger*, No. C 09-2292 VRW (N.D.Cal., filed May 22, 2009).
[50] *Bush v. Gore*, 531 U.S. 98 (2000).

marriage licenses after Proposition 8 was passed), but also because of the response to the lawsuit by the defendants. Governor Arnold Schwarzenegger and Attorney General Edmund G. Brown, Jr., who were named as lead defendants together with the head of the marriage license bureau and the county clerks who had denied the plaintiffs' license applications, indicated that they were not willing to defend Proposition 8 from constitutional attack. Both of these officials had opposed its enactment, and the attorney general had stated his doubts about the constitutionality of the measure in responding to the complaint in *Strauss v. Horton*. Judge Walker granted a motion by the organization that had proposed Proposition 8, ProtectMarriage.com, and its leaders (generally referred to as the Proponents), to intervene as defendants in order to provide a substantive defence, and also granted a motion by the City of San Francisco to intervene in support of the plaintiffs. But he denied intervention motions by various LGBT rights organizations who had participated in the original California marriage case, and a motion by the Assistant Clerk of Imperial County to intervene on behalf of defendants. The plaintiffs had opposed intervention by the LGBT rights groups, as these groups had strongly opposed the filing of the lawsuit. However, the plaintiffs raised no objections to these groups filing *amicus curiae* briefs.

Pre-trial skirmishing lasted until early 2010, when a trial was held on January 11 to 27.[51] The plaintiffs testified as to their experiences and the impact of denial of marriage on their lives. Numerous experts on behalf of the plaintiffs were presented to compile a rich factual record on virtually all the points that might be contested regarding same-sex couples, parenting and marriage. The defendants presented only two experts, whose testimony about why marriage had to be denied to same-sex couples was deemed lacking in credibility by Judge Walker.

The court issued its ruling on August 4, 2010. Judge Walker found that Proposition 8 deprived same-sex couples of a fundamental right, the right to marry,[52] and so theoretically should be subjected to the strict scrutiny approach, under which the measure would only survive if it was shown to be necessary to achieve a compelling state interest. However, his analysis of the record led him to conclude that Proposition 8 could not withstand the usual deferential rational basis review, so he found it unnecessary to employ strict scrutiny to make a ruling. Similarly, he found it unnecessary to determine whether sexual orientation was a suspect classification, as he found that "the

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[51] An important part of the pre-trial skirmishing involved Judge Walker's decision, with the approval of the 9th Circuit, to have the proceedings simultaneously broadcast in several federal courthouses around the country in order to satisfy public interest in the proceedings. The Proponents appealed this decision, arguing that broadcasting would deter their experts from testifying, and won a ruling from the U.S. Supreme Court prohibiting the broadcast, just a day prior to the commencement of the trial. *Hollingsworth v. Perry*, 130 S.Ct. 705 (2010).

[52] The right to marry has been recognized as a fundamental right under the 14th Amendment, at least arguably, since the Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), striking down state laws against mixed-race marriages on the ground that the government had no compelling interest in dictating on the basis of race an individual's choice of marital partner.

Equal Protection Clause renders Proposition 8 unconstitutional under any standard of review."[53]

Distilling the record and arguments presented by Proponents and numerous *amici curiae*, Judge Walker determined that the defence of Proposition 8 fell into six categories of 'purported interests.' These were purported interests rather than specifically articulated interests because the measure resulted from a ballot initiative rather than a legislative process in which one could source particular policy justifications in committee reports or floor debate leading to passage, and it would be impossible to know the policy interests motivating all of those who voted to support the measure. Consequently, the official ballot pamphlet, the official description of the measure, and the advertising campaign carried on by the Proponents, together with the contentions of their expert witnesses, served as the source of 'purported interests' that Proposition 8 was 'intended' to effectuate.

The first purported interest was to reserve marriage as a union between a man and a woman, excluding any other relationship. Walker saw this as a resort to tradition, preserving an institution for the sake of preserving it without providing a reason why the state should want to do that. "Tradition alone," he insisted, "cannot form a rational basis for a law... Rather, the state must have an interest apart from the fact of the tradition itself."[54] Indeed, if tradition by itself could constitute a rational basis for maintaining a discriminatory law, the Supreme Court could not have overturned laws against miscegenation or sodomy, which were of long standing at the time that *Loving* and *Lawrence v. Texas* were decided. And, Walker found, the Proponents had not shown that the state had an interest apart from tradition in treating same-sex couples as inferior to different-sex couples, which denying them the right to marry would do.

The second purported interest was proceeding with caution when implementing social changes. The argument went that sudden changes in a 'bedrock social institution' such as marriage could be harmful to society, so the state could proceed incrementally, as California was doing prior to the decision in *In re Marriage Cases* by enacting domestic partnership and gradually increasing the rights associated with it. Judge Walker was unconvinced, finding that there was no evidence in the record that allowing same-sex couples to marry would have "any negative effects on society or on the institution of marriage," and that the rights of those opposed to homosexuality or same-sex couples "will remain unaffected if the state ceases to enforce Proposition 8."[55] Judge Walker's decision was undoubtedly bolstered by the experience of other states, especially Massachusetts, where same-sex marriage became available in 2004, six years earlier, with no discernable ill effects on that state.

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[53] 704 F.Supp.2d, at 906-907.
[54] *Ibid.*, at 998.
[55] *Ibid.*, at 999.

The third purported interest was promoting opposite-sex parenting over same-sex parenting. Judge Walker rejected this as a rational basis for prohibiting same-sex marriages, because the trial record showed that "same-sex parents and opposite-sex parents are of equal quality" and that there was no evidence that enforcement of Proposition 8 made it "more likely that opposite-sex couples will marry and raise offspring biologically related to both parents."[56] Indeed, it would be hard to argue in 2010 that California had an interest in favouring different-sex couples over same-sex couples as parents, since California law had evolved through judicial decisions and the courts to treat same-sex couples as equal to different-sex couples in much of the law concerning child custody, visitation, and parental responsibility.

The fourth purported interest was protecting the freedom of those who opposed same-sex marriage. As to this, one of the main themes of Proponents' advertising during the initiative campaign was that allowing same-sex marriage would threaten the ability of parents to shield their children from exposure to the concepts of same-sex marriage and homosexuality, because these topics would necessarily become part of the family life curriculum in the public schools. Judge Walker dismissed this concern by reference to existing California law predating Proposition 8, and found irrational the argument that the state could find a legitimate reason to deny marriage to one group based merely on the opposition of another group.

The Proponents also asserted a state interest in treating same-sex couples differently from different sex couples by using a different name to identify their relationships, which would maintain the flexibility to treat different types of relationships differently and ensure that California marriages were recognized by other jurisdictions and would conform to federal law. Judge Walker found that the record supported a conclusion that in all relevant respects for legal policy purposes, same-sex and different-sex marriages were "exactly the same," and asserted that claimed differences relied on moral and religious views. To the extent that this was an argument about the administrative burdens of issuing and recognizing marriage licenses, Walker found that the earlier regime of separate institutions of marriage and domestic partnership were, if anything, more administratively burdensome.

Although Proponents had advanced a catch-all argument seeking to sweep in any grounds that had been argued by the parties, *amici*, or the court at any point in the proceedings, Walker found that the first five categories discussed above exhausted the argument, and that Proponents had not identified any other plausible rational bases for sustaining Proposition 8. After a lengthy trial, culminating in extended, detailed fact findings in his opinion, Walker concluded, "The resulting evidence shows that Proposition 8 simply conflicts with the guarantees of the Fourteenth Amendment."[57]

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[56] *Ibid.*, at 999-1000.
[57] *Ibid.*, at 1001-2.

Finally, Judge Walker opined that in the absence of any rational justification for denying same-sex couples the right to marry, the only remaining motivation must be "an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples." Whether this was based on moral disapproval of homosexuality, animus against gays, or some unproven belief that different-sex couples were somehow better than same-sex couples, it could not be the basis for a government policy disadvantaging same-sex couples, in light of rulings such as *Romer* and *Lawrence* that found unconstitutional state policies or laws that disadvantaged gay people on such bases. He found the Proponent's arguments to be "post-hoc justifications" that failed to provide logical support for the measure, and, as such, that what Proposition 8 really did was to enact a "moral view."[58]

Judge Walker ordered that the enforcement of Proposition 8 be permanently enjoined, and denied a post-trial application for a stay pending appeal filed by the Proponents.[59] Governor Schwarzenegger, whose term was soon ending, and Attorney General Brown (by then an active candidate for Governor), expressed satisfaction with the decision and no intention to appeal, and opposed the granting of a stay.

In opposing the application for a stay, the Plaintiffs raised for the first time the argument that Proponents lacked standing to seek further proceedings in the case, in light of the Supreme Court's jurisprudence on appellate standing, especially its ruling in the Arizona *English Only* case.[60] Arizona voters approved a constitutional amendment providing that only English could be spoken in government offices. A state employee challenged it in federal court, claiming a violation of her constitutional rights. The District Court declared the law unconstitutional and the named government defendants decided not to appeal, but the 9th Circuit allowed the proponents of the initiative to intervene as appellants. By the time the case reached the Supreme Court, the original plaintiff was no longer a state employee and the Court avoided ruling on the merits by dismissing the appeal as moot and vacating the lower court's opinion. In the course of its decision, the Court cast substantial doubt on the standing of the appellants, finding that they had no particularized interest in the outcome that would confer individual standing, which is necessary because the federal courts' jurisdiction is limited under Article III of the Constitution to "actual cases and controversies," a requirement that the Supreme Court has construed to rule out advisory opinions or the consideration of cases in which the plaintiff has only a theoretical interest. The Court mentioned that the parties had not presented any authority under Arizona law for finding that initiative proponents had personal standing to litigate about the constitutional merits of their initiative. Judge Walker cited this and other Supreme Court cases in his opinion denying the stay.

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[58] *Ibid.*, at 1002-3.
[59] 702 F.Supp.2d 1132 (N.D.Cal. 2010).
[60] *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

The Proponents then petitioned the 9th Circuit for a stay, joined by the deputy clerk from Imperial County, who sought to re-enter the case in light of the failure of the governor and attorney general to appeal. The 9th Circuit's motion panel granted a temporary stay and set an expedited argument for December 6, 2010, noting that half the argument would be devoted to the question of petitioners' standing, and half to the merits of the appeal.[61] Soon after that argument was held before a panel of judges constituted to hear the appeal on the merits, the panel issued an order certifying to the California Supreme Court the question whether there was any authority under California law for the Proponents to represent the state's interest on appeal, and dismissing the deputy clerk of Imperial Country from the case.[62] Although ultimately the question of Article III standing is a matter of federal constitutional law for the 9th Circuit panel to decide, the Supreme Court's dicta in the Arizona case suggested that a preliminary answer to the state law standing question was significant, and there was no California Supreme Court precedent directly on point. The California Supreme Court accepted the certification and set the case for briefing and argument. Subsequently, the 9th Circuit panel denied a new motion by the respondents to lift the temporary stay.[63]

However the appeal turns out, Judge Walker's decision provides another milestone. For the first time, a federal judge has ruled that there is no rational basis for states to deny same-sex couples the right to marry, and so consistent with the 14th Amendment a state constitutional provision reserving the right to marry to different-sex couples violates both the Due Process and Equal Protection Clauses. While same-sex marriage proponents had won important victories under state constitutions in Massachusetts, Iowa, and Connecticut, a *federal* constitutional ruling in the Proposition 8 case had the potential to blossom into a nationwide precedent were it to proceed to the Supreme Court, as many had assumed it would when the case was filed. The decision by Governor Schwarzenegger and Attorney General Brown (now Governor Brown) not to appeal the ruling, and the potential conclusion that the Proponents lack standing to appeal, may result in leaving Judge Walker's decision intact and unreviewable, and one could only speculate as to whether that would mean that Proposition 8, approved by millions of California voters, could be cast aside on the determination of a single federal judge.[64]

Conclusion

Judge Walker's decision in *Perry*, issued just weeks after Judge Tauro had invalidated Section 3 of DOMA using similar reasoning in *Gill*, suggested that a corner may have been turned in the unfolding story of LGBT rights in the federal courts. When the subsequent rulings by Judge Phillips in *Log Cabin Republicans* and Judge Leighton in *Witt*, and the denial of the motion to dismiss

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[61] *Perry v. Schwarzenegger*, 2010 WL 3212786 (9th Cir. 2010).
[62] *Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011).
[63] *Perry v. Schwarzenegger*, 2011 WL 1034175 (9th Cir. 2011).
[64] The 9th Circuit panel noted the difficulties this might present in its order certifying the standing question under state law to the California Supreme Court, 2010 WL 3212786.

in *Dragovich* by Judge Wilken, are considered in tandem with the other two rulings, it appears that a consensus may be forming, if not around the proposition that all sexual orientation discrimination claims should invoke heightened scrutiny with a presumption that discriminatory policies are unconstitutional, then at least around the proposition that traditional grounds for government to disfavour sexual minorities or exclude them from participation in government programs or access to government benefits on an equal basis with the presumed sexual majority, are most likely to be rejected, whether the case involves claimed deprivations of due process or of equal protection. After *Romer* and *Lawrence*, it becomes clear that moralistic disapproval of homosexuality will no longer be accepted by courts as a justification for such policies, and that even under the rational basis approach, courts are increasingly unwilling to indulge hypothetical or "common sense" arguments based on stereotypical assumptions. That such a consensus seems to have emerged so soon after the crushing defeat in *Bowers v. Hardwick*, when a majority of the Supreme Court was willing to credit moral disapproval as a rational justification for the application of a felony sodomy law to a consenting same-sex adult couple, surely marks 2010 as a miraculous year in LGBT law in the United States. One or two such rulings might be seen as anomalies against the background of decades of adverse precedent, but rulings from five different federal trial judges in different districts, followed by a Congressional repeal of DADT and an administrative renunciation of defending Section 3 of DOMA, suggest that a decisive turning point has been reached.